When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy

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I. INTRODUCTION

After two prominent U.S. Supreme Court decisions on partisan gerrymandering during recent years, the law of partisan gerrymandering remains as muddled as beforehand. Commentators attribute the Court's confused reasoning, after which the Court still fails to provide a legal standard for partisan gerrymandering, to a broader failure to apply a structural approach to problems in the law of democracy.[1] Under this view, the Court encounters doctrinal dead ends, epitomized by the partisan gerrymandering cases, precisely because it refuses to shift its conventional focus on individual rights to a new structural focus on a substantive vision of the proper functioning of the political process. However, in this brief Article, I speculate that quite the opposite may be true. The Court's failures in the partisan gerrymandering cases may result from what amount to efforts by the Court to move in structural directions. The partisan gerrymandering cases therefore highlight what may be serious practical challenges for judicial application of a structural approach to the law of democracy.

In the recent partisan gerrymandering decisions, *Vieth v. Jubelirer*[2] and *League of United Latin American Citizens v. Perry*,[3] a highly fractured Court issued a confusing set of opinions that collectively provide little guidance to courts and litigants. Both cases presented the Court with aggressive partisan gerrymanders that raised hopes that the Court might strike down a legislative redistricting as unconstitutional partisan gerrymandering for the first time in two decades and, in the process, clarify what had been a confusing

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[1] *See, e.g.*, Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1944–51 (2006); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541 (2004); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).

[2] Vieth v. Jubelirer, 541 U.S. 267 (2004).

[3] League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) [hereinafter *LULAC*].

constitutional standard. However, the end result added to the confusion, rather than lessening it. On one hand, a divided Court ruled that partisan gerrymandering would continue to be a justiciable constitutional matter after *Vieth* and *LULAC*.[4] A majority of the Court agreed that partisan gerrymandering could go too far beyond some constitutional bound. On the other hand, the Court failed to reach any collective decision about a standard for adjudging that constitutional bound. Although the Court found the redistrictings in *Vieth* and *LULAC* to be safely constitutional, a majority of the Court could not reach agreement as to why the redistrictings in *Vieth* and *LULAC* were constitutional or even articulate a standard for adjudicating such partisan gerrymandering claims in the future.[5] In other words, even as the Court insists that partisan gerrymandering claims are justiciable, it nonetheless refuses to offer a collective answer about what standard should apply for adjudicating gerrymandering claims going forward.[6]

Critics argue that the Court's failures with partisan gerrymandering are symptomatic of the Court's profound inability to view the law of democracy properly through a structural lens. For instance, Heather Gerken argues "[w]e should not be surprised that *Vieth* caused the Justices so many headaches."[7] The Court, when analyzing gerrymandering claims, must decide "how to structure the election process," and therefore the Court's usual focus on "individual rights does not fully capture what is at stake in these cases."[8] Commentators have long urged courts to adopt a structural approach, emphasizing the ultimate practical effects of law on the structure of political dynamics and undergirded by a normative vision of healthy democratic politics. Gerken concludes that *Vieth* is a cautionary example of judicial

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[4] *Vieth*, 451 U.S. at 309–10 (Kennedy, J., concurring in the judgment); *LULAC*, 126 S. Ct. at 2607 (refusing to revisit the justiciability of partisan gerrymandering).

[5] *Vieth*, 541 U.S. at 310–16 (Kennedy, J., concurring in the judgment); *LULAC*, 126 S. Ct. at 2609–12. I myself am not a strong advocate of judicial intervention against partisan gerrymandering. In earlier work, I argued that judicial restriction of partisan gerrymandering would simply lead to more incumbent entrenchment. *See* Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 443 (2005). One form of gerrymandering, the offensive gerrymandering designed to uproot minority party incumbents, would be replaced by another form of gerrymandering: defensive gerrymandering designed to insulate majority party incumbents. *See id.* at 454–56.

[6] Daniel Lowenstein criticizes Justice Kennedy's actions as "extraordinarily irresponsible." Daniel H. Lowenstein, Vieth*'s Gap: Has the Supreme Court Gone From Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL'Y 367, 394 (2005). Luis Fuentes-Rohwer deems Justice Kennedy's position misleading and subversive. Fuentes-Rohwer, *supra* note 1, at 1944–51.

[7] Gerken, *supra* note 1, at 506.

[8] *Id.* at 507.

adherence to an individual-rights approach to the law of democracy and offers "further evidence that if the Court wishes to remain in this part of the political thicket, it should develop a structural approach."[9]

However, the Court's failures in the recent gerrymandering cases may have resulted precisely *because* of attempts to adopt important aspects of a structural approach to the law of democracy. Justice Kennedy's concurring opinion in *Vieth* and majority opinion in *LULAC* spoke for the Court on partisan gerrymandering in those cases, and his position, if taken at face value, can be understood as an attempt to confront the structural complexity of the law of democracy. Indeed, Justice Kennedy turns away from the individual-rights focus that occupies his colleagues in *Vieth* and *LULAC* and once dominated his approach to redistricting in the domain of racial gerrymandering. In *Vieth* and *LULAC*, Justice Kennedy purports to demand a larger vision for law and politics that borrows from a structural approach in ways that are easy to overlook and underrate. Just as importantly, Justice Kennedy's move towards a structural approach suffers from a critical loss of judicial confidence and fails in the end.

The Court and Justice Kennedy's failure in *Vieth* and *LULAC* thus may be telling for the feasibility, quite apart from the substantive merits, of a structural approach to the law of democracy. Justice Kennedy's commitment to developing a vision of politics before crafting the law of partisan gerrymandering tests the possibilities and promises of a structural approach to the law of democracy. If a normative vision of politics is relevant anywhere, it most certainly plays out in the fair balancing between the major political parties. However, *Vieth* and *LULAC* may demonstrate the vulnerabilities of a structural approach to the law of democracy. Justice Kennedy's hesitation to embrace a standard, or even push forward in developing one, suggests deep ambivalence about the capacity of judges to manage the American political system in the way that many scholars urge. Even Justice Kennedy, the Justice who decided *Bush v. Gore*,[10] blinks when required to flesh out a forthright structural vision regarding the constitutional bounds for American partisan politics.

I should clarify that I do not mean in this Article to dispute the substantive merits of a structural approach to the law of democracy. Structural understanding is a necessary predicate to developing the law of democracy and has been difficult to identify in the Court's jurisprudence.

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[9] *Id.* at 528.

[10] Bush v. Gore, 531 U.S. 98 (2000) (per curiam). Early on, Justice Kennedy was rumored to be the author of the per curiam opinion in *Bush v. Gore*. *See* Joan Biskupic, *Election Still Splits Court*, USA TODAY, Jan. 22, 2001, at 1A. Clerks from the 2000 Term later confirmed the truth of the rumor. *See* David Margolick, Evgenia Peretz, & Michael Schnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 357–58.

Nonetheless, the outcomes in the partisan gerrymandering cases may cast doubt on the institutional self-confidence of courts to address structural questions even when they identify and confront these challenges intrinsic to the law of democracy. That is, this Article attempts to draw out the ways that the struggles of the Court, and Justice Kennedy in particular, may help illustrate the practical limitations and concerns that courts face when they begin to move toward a structural approach.

In Part II, I set the stage by introducing and briefly discussing *Vieth v. Jubelirer* and *LULAC v. Perry*. I explain Justice Kennedy's controlling opinions for the Court in these cases and the oddity of his position on partisan gerrymandering. I explore how Justice Kennedy reaches his untenable position, paralyzed between justiciability and the desperate need to announce a legal standard for adjudication. In Part III, I connect Justice Kennedy's paralysis on partisan gerrymandering with a structural approach to the law of democracy. I argue that Justice Kennedy's efforts on partisan gerrymandering reflect a weakness of judicial capacity and are thus suggestive about courts' willingness and ability to intervene further into the law of democracy during the years to come.

II. JUSTICE KENNEDY AND THE PARTISAN GERRYMANDERING CASES: *VIETH* AND *LULAC*

The Supreme Court's recent interest in partisan gerrymandering raised hopes that the Court would clarify its decision two decades ago in *Davis v. Bandemer*.[11] Justice White's opinion for a plurality in *Bandemer* declared partisan gerrymandering justiciable under the Equal Protection Clause. *Bandemer*, though, did not strike down the Indiana gerrymander at bar and announced that partisan gerrymandering would be declared unconstitutional only when the plaintiff's party had "essentially been shut out of the political process"[12]—a standard that proved impossible to meet in practice.

Unfortunately, *Vieth* and *LULAC* have dissatisfied everyone, both critics and defenders of partisan gerrymandering, and placed Justice Kennedy again at the center of the Court. In this Part, I briefly describe the multiple opinions in *Vieth* and *LULAC* and explain the alignment of the Justices in these cases, with Justice Kennedy squarely in the middle.

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[11] Davis v. Bandemer, 478 U.S. 109 (1986). In *Bandemer*, the Court confronted a Republican gerrymander of Indiana in which Democrats received fifty-two percent of the votes for the State House of Representatives but won only forty-three percent of the seats. *Id.* at 134.

[12] *Id.* at 139.

A. Vieth v. Jubelirer

In *Vieth v. Jubelirer*, decided eighteen years after *Bandemer*, the Court confronted a redistricting of Pennsylvania and a new opportunity to revisit judicial intervention against partisan gerrymandering.[13] Following the 2000 Census, Pennsylvania Republicans engineered an ambitious gerrymander of the state's congressional districts designed to convert a one-congressperson advantage for the Republicans to a seven-congressperson edge.[14] Pennsylvania Republicans refused official participation by their Democratic colleagues in the redistricting process, and the National Republican Congressional Committee boasted that "[t]he Pennsylvania plan goes a long way to solidifying our net gain of eight to ten seats nationally."[15] Nonetheless, under the *Bandemer* standard, the district court held that the Pennsylvania gerrymander did not warrant judicial intervention.[16]

In *Vieth*, speaking for a plurality, Justice Scalia declared that nothing had changed since *Davis v. Bandemer* to warrant greater judicial intervention.[17] Justice Scalia argued that the standard announced in *Bandemer* proved to be an unmanageable "totality-of-the-circumstances analysis, where all conceivable factors, none of which is dispositive" are assessed to determine overall fairness.[18] Fairness, Justice Scalia reasoned, is not judicially manageable.[19]

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[13] Vieth v. Jubelirer, 541 U.S. 267 (2004).

[14] *See, e.g.*, James O'Toole, *GOP Remap Back On Line: State Republicans Reach Compromise Among Themselves*, PITTSBURGH POST-GAZETTE, Dec. 21, 2001, at A1.

[15] Chris Cillizza, *Republicans Score Big in Pa.*, ROLL CALL, Jan. 7, 2002, at 9 (quoting Carl Forti, spokesperson, National Republican Congressional Committee).

[16] The district court promptly found that the plaintiffs had failed to allege facts "indicating that they have been shut out of the political process" and dismissed their partisan gerrymandering claims. Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 547 (M.D. Pa. 2002); *see also* Vieth v. Pennsylvania, 241 F. Supp. 2d 478, 484–85 (M.D. Pa. 2003).

[17] *Vieth*, 541 U.S. at 282–83 (plurality). Justice Scalia's argument was not new. In *Bandemer*, Justice O'Connor, in concurrence, argued that partisan gerrymandering should be nonjusticiable. *Bandemer*, 478 U.S. 109, 144–61 (1986) (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment). Justice O'Connor argued that redistricting is "fundamentally a political affair" that presents a "political question in the truest sense of the term." *Id.* at 145. Partisan gerrymandering should be nonjusticiable as a political question because, in Justice O'Connor's opinion, there was no standard, at least not a judicially manageable one, by which courts could properly judge when a gerrymander had gone too far. In the end, however, Justice O'Connor did not speak for the Court in *Bandemer*.

[18] *Vieth*, 541 U.S. at 291 (plurality).

[19] *Id.* As a result, Justice Scalia concluded that eighteen years of judicial effort left the law of partisan gerrymandering with "virtually nothing to show for it," and, indeed,

Of course, nearly the entire Court nonetheless agreed as a general matter that "partisan districting is a lawful and common practice."[20] Partisan gerrymandering could be deemed unconstitutional, as a result, only when redistricting violates the "obligation not to apply *too much* partisanship in districting."[21] Notably, Justice Scalia cautioned that his opinion did not address the merits of the substantive constitutional question whether severe partisan gerrymandering ever could violate the principles of the Constitution.[22] Instead, he focused on the prudential question "whether it is for the courts to say when a violation has occurred, and to design a remedy."[23] Justice Scalia concluded there simply was no judicially manageable standard for determining "[h]ow much political motivation and effect is too much?"[24]

The dissenters in *Vieth* offered their own attempts at a legal standard for the question. Justice Souter proposed a standard based on the burden-shifting methodology in race discrimination from *McDonnell Douglas Corp. v. Green*.[25] Justice Stevens, in dissent, offered an alternate standard for partisan gerrymandering, borrowed from *Shaw v. Reno*,[26] that Justice Scalia also summarily dismissed.[27] Finally, Justice Breyer proposed an entrenchment

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demonstrated the folly of *Bandemer* in holding that partisan gerrymandering is justiciable at all. *Id.* at 281.

[20] *Id.* at 286.

[21] *Id.*

[22] *Id.* at 292.

[23] *Vieth*, 541 U.S. at 292 (plurality).

[24] *Id.* at 297.

[25] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973). To challenge a particular district as unconstitutional under Justice Souter's proposal, the plaintiff would need to show that (1) she is a member of a cohesive political group; (2) her district was drawn with "little or no heed" to traditional districting criteria; (3) the resulting divergence from traditional districting criteria had a negative effect on the plaintiff's political group; (4) there is a hypothetical district that would diverge less from traditional districting criteria and have less negative effect on the plaintiff's political group; and (5) the government, in drawing the plaintiff's district, acted intentionally to affect the plaintiff's political group negatively. *Vieth*, 541 U.S. at 347–51 (Souter, J., joined by Ginsburg, J., dissenting). Upon prima facie showing of these five elements, the burden would shift to the government to justify the challenged district with reference to objectives other than naked partisan advantage. *See id.* at 351–52. Because this standard was modeled so closely on standards that courts had already employed in practice, Justice Souter concluded that the standard must be eminently manageable. Justice Scalia disagreed.

[26] Shaw v. Reno, 509 U.S. 630, 649 (1993).

[27] *Vieth*, 541 U.S. at 334–39 (Stevens, J., dissenting). Justice Stevens argued that the "predominant motive" standard from racial gerrymandering provided a judicially manageable standard for adjudicating gerrymandering of the partisan variety as well. *Id.*

standard for partisan gerrymandering that Justice Scalia again found wanting.[28] Justice Scalia therefore concluded, in the absence of a workable standard, that the constitutional question ought to be deemed nonjusticiable. Justice Scalia's plurality opinion, however, commanded only four votes and needed Justice Kennedy's vote to dismiss the partisan gerrymandering claims in *Vieth*.

In his concurrence, Justice Kennedy staked out his own position, squarely between the plurality and the dissenters, that spoke for the Court as the decisive fifth vote for the majority in judgment. Justice Kennedy concurred that the plaintiffs' gerrymandering claims must be dismissed and agreed with Justice Scalia and the plurality that neither litigants nor courts had yet offered judicially manageable standards for partisan gerrymandering.[29] However, Justice Kennedy departed sharply from the plurality by declaring that partisan gerrymandering should remain a justiciable claim even in the absence of judicially manageable standards to apply to the claim.[30] Where the plurality concluded that no judicially manageable standards were possible for partisan gerrymandering, Justice Kennedy held out hope for their development in the future.[31]

The problem for Justice Kennedy was his belief that there was currently no established consensus about a substantive definition of political fairness from which to build up a standard for partisan gerrymandering. Justice Kennedy explained that "[n]o substantive definition of fairness in districting seems to command general assent."[32] Without a neutral standard for redistricting, Justice Kennedy argued that it is impossible to identify a

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He reasoned that the methodology from *Shaw v. Reno* ought to adapt easily to identify cases when partisan considerations had become a predominant factor motivating a legislature's districting decision, just as courts had used it to identify cases when racial considerations had been a predominant factor and thus unconstitutionally applied. *Id.* at 334–39 (Stevens, J., dissenting). However, Justice Scalia quickly concluded that it is simply not so that "if we can do it in the racial gerrymandering context we can do it here." *Id.* at 292.

[28] *Id.* at 365 (Breyer, J., dissenting). Justice Breyer suggested in dissent that the linchpin to the constitutional offense of partisan gerrymandering must be "the unjustified entrenching in power of a political party that the voters have rejected." *Id.* More so than any of his colleagues, Justice Breyer focused on the harm from partisan gerrymandering rather than proposing specific standards to be implemented.

[29] *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment).

[30] *Id.* at 311 (Kennedy, J., concurring in the judgment).

[31] *Id.* at 309 (Kennedy, J., concurring in the judgment). Justice Kennedy acknowledged the "weighty arguments" of the plurality in favor of nonjusticiability but concluded that the present absence of judicially manageable standards ought not to "bar all future claims of injury from a partisan gerrymander." *Id.* at 309 (Kennedy, J., concurring in the judgment).

[32] *Id.* at 307 (Kennedy, J., concurring in the judgment).

baseline from which to measure the harm inflicted by partisan gerrymandering. He concluded that "we have no basis on which to define clear, manageable, and politically neutral standards" for assessing partisan gerrymandering.[33]

In short, Justice Kennedy believes that courts must begin with an affirmative vision about legitimate redistricting practices and fair partisan outcomes before the Court can develop a theory of unconstitutional partisan gerrymandering. In Justice Kennedy's mind, understanding the obverse necessarily precedes understanding the reverse. Inability to define what constitutes a fair redistricting as a positive matter thus makes it impossible to identify what constitutes an unfair, and therefore unconstitutional, gerrymander. As Justice Frankfurter once warned skeptically, redistricting cases require courts to "choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government."[34] Justice Kennedy, in accordance, believes that a first step in crafting a partisan gerrymandering standard is judicial identification of an "agreed upon model of fair and effective representation."[35]

Here, courts and commentators have struggled for answers since the reapportionment revolution began with *Baker v. Carr*.[36] Redistricting implicates myriad conflicting considerations, among them the legitimate consideration of partisanship, that render it enormously complicated to produce an affirmative account of fair redistricting. Even critics of partisan gerrymandering admit immense indeterminacy about the proper normative baseline for judging partisan fairness in redistricting.[37] Without consensus, Justice Kennedy concluded that the "impossibility of full analytical

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[33] *Id.* at 307–08 (Kennedy, J., concurring in the judgment).

[34] Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

[35] *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment).

[36] *See generally* Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781 (2005); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667 (2006); Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1 (1985); Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459 (2004).

[37] *See, e.g.*, Berman, *supra* note 36, at 821–25; Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1647 (1993) (acknowledging "the lack of a defensible judicial standard for determining . . . whether elections under a particular districting scheme fairly reflect majoritarian preferences"); Samuel Issacharoff, *Racial Gerrymandering in a Complex World: A Reply to Judge Sentelle*, 45 CATH. U. L. REV. 1257, 1259 (1996) (agreeing that "all redistricting is gerrymandering").

satisfaction is reason to err on the side of caution"[38] and refused to provide a legal standard.

For partisan gerrymandering, Justice Kennedy and the Court could have crafted a standard that strikes down as unconstitutional only the most egregiously unfair gerrymanders. One need not be able to define comprehensively what constitutes the full range of permissible behavior before one can decide whether a particular instance is impermissible.[39] It is not necessary for the Court to devise a standard that maps perfectly onto a shared theory of constitutionality for partisan gerrymandering. The simpler task, then, is to devise a standard that defines the overlapping subset of gerrymanders that a majority of Justices would agree is unconstitutional.[40] The resulting standard would represent what Cass Sunstein calls an "incompletely theorized" ruling—a factually specific decision with only a minimally theorized rationale, on the narrowest theoretical basis, to support the result.[41] As Justice Souter noted, despite the absence of a "full-blown theory of fairness," it remains possible "for courts to identify at least the worst cases of gerrymandering."[42] Of course, the resulting prohibition would be underinclusive. It would strike down fewer gerrymanders than perhaps it should under a clearer definition of political fairness.[43] Nonetheless, an

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[38] *Vieth*, 541 U.S. at 311 (Kennedy, J., concurring in the judgment).

[39] *See* Heather K. Gerken, *The Costs of Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1433 n.79 (2002) (concurring with Samuel Issacharoff that sophisticated and precise theory is unnecessary where wrongs are clearest under a variety of alternate theories); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1612 (1999) ("In theory and in doctrine, we can often identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right."). *See generally* EDMOND CAHN, THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW 11 (1955); EDMOND CAHN, THE SENSE OF INJUSTICE (1949).

[40] All but one Justice agreed that partisanship can be taken too far in redistricting. *See* Brief for Appellants at 32, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580), 2003 WL 22070244.

[41] *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[42] *Vieth*, 541 U.S. at 354 (Souter, J., joined by Ginsburg, J., dissenting).

[43] In fact, there is reason to believe that Justice Kennedy actually favors just such a permissive standard for partisan gerrymandering. Justice Kennedy, after all, voted to allow the notorious gerrymanders at issue in *Vieth* and *LULAC*. Each gerrymander was executed pursuant to a nationwide strategy by the Republicans to advance their party's congressional interests through redistricting in several states. The partisan gerrymander of Texas was unprecedented, occurring only a year after the decennial post-census redistricting had put a court-approved plan in place. *See* Fourth Amended Complaint of Intervenors Mayfield et al. at ¶¶ 1–23, Balderas v. Texas, No. 6:01CV158, 2001 WL 34104836 (E.D. Tex. Nov. 28, 2001) (per curiam), 2001 WL 35673968, *summarily aff'd*,

underinclusive standard would permit the Court to act against gerrymandering without requiring an antecedent, perhaps unattainable development of an "agreed upon model of fair and effective representation."[44]

However, Justice Kennedy did not consider an incompletely theorized decision in *Vieth*, and as I explain in the following section, again refused to do so in *LULAC*. Notably, Justice Kennedy insisted instead on building up the law of partisan gerrymandering from a more fully theorized foundation of neutral principles about partisan fairness.

B. LULAC v. Perry

When the Court again revisited partisan gerrymandering in *LULAC* only two years after *Vieth*, many hopes rose that a new opportunity might persuade Justice Kennedy to sanction more vigorous judicial intervention, or at least decide upon a standard for judicial intervention. *LULAC* presented the 2003 mid-decade redistricting of Texas in which the defendants admitted that partisanship was "110 percent" of their motivation.[45] However, *LULAC* once more disappointed those hoping for judicial action against partisan gerrymandering. Despite the addition of two new Justices since *Vieth*, the Court divided along almost identical grounds as in *Vieth*, with no real change in the law.

The *LULAC* plaintiffs hoped that the Texas redistricting presented a perfect test case for excessive partisanship. In 2002 when Texas Republicans gained full control of the Texas legislature, a court-drawn and approved redistricting plan was already in place following the 2000 Census, and no new redistricting was required by law.[46] For this reason, plaintiffs in *LULAC* alleged that the 2003 redistricting that followed was motivated solely by partisan purposes and brought multiple challenges alleging unconstitutional partisan gerrymandering. In *Vieth*, Justice Kennedy had hypothesized that "[i]f a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation . . . ,' we would surely conclude the Constitution had been

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536 U.S. 919 (2002). It converted a seventeen-to-fifteen Democratic advantage in the Texas congressional delegation into a twenty-one-to-eleven Republican advantage, a Republican gain of six seats. Based on *Vieth* and *LULAC*, Justice Kennedy seems to be seeking a standard that is even more permissive than any favored by the dissenters.

[44] *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment).

[45] Brief for Appellants at 12, LULAC v. Perry, 126 S. Ct. 2594 (2006) (No. 05-276), 2006 WL 62062.

[46] *See* Kang, *supra* note 5, at 465–68 (2005) (describing events leading to the 2003 redistricting).

violated."[47] Justice Kennedy intended this hypothetical as an extreme instance where partisan intent would be obvious, and indeed the *LULAC* plaintiffs alleged that this was the situation presented by *LULAC*. The State of Texas had admitted outright before the Court that partisanship was the sole motivation for the repeat redistricting.[48] Regardless of whether the partisan effect of the *LULAC* redistricting went too far, the partisan intent seemed to qualify under Justice Kennedy's earlier hypothetical.

Justice Kennedy again spoke for the Court on partisan gerrymandering and again rejected as judicially unmanageable all attempts at fashioning a legal standard. He expressed skepticism, implicitly disavowing the implication from his hypothetical in *Vieth*, "of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted."[49] Without revisiting the larger question of justiciability, Justice Kennedy once more dismissed the plaintiffs' partisan gerrymandering claims without explaining how they fell short under a particular standard for adjudicating those claims.[50]

In *LULAC*, four other Justices joined Justice Kennedy in dismissing the partisan gerrymandering claims, though they did so on disparate grounds. Justice Scalia's position, joined by Justice Thomas, remained unchanged from *Vieth* and again argued in favor of nonjusticiability of partisan gerrymandering claims altogether.[51] Chief Justice Roberts and Justice Alito, the new members of the Court, agreed that no justiciable standard had been presented in *LULAC*, but notably, they reserved judgment whether any such standard exists at all.[52] The four dissenters in *Vieth* dissented again in *LULAC*. So, in *LULAC*, as in *Vieth*, the Court divided essentially 4-1-4 on partisan gerrymandering.[53]

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[47] *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment).

[48] One of the Republican architects of the redistricting admitted that his aim was to "get as many seats as we could," and another Republican leader confessed that partisan gain was "110 percent" of the motivation for the mid-decade redistricting, a point that the State of Texas conceded in its post-trial briefing before the district court. Brief for Appellants, *supra* note 45, at 12.

[49] *LULAC*, 126 S. Ct. at 2609–10.

[50] *Id.* at 2607, 2609–12.

[51] *Id.* at 2663 (Scalia, J., joined by Thomas, J., concurring in part dissenting in part).

[52] That is, they noted that the threshold question of justiciability had not been raised in the case and did not address it. *Id.* at 2652 (Roberts, C.J., joined by Alito, J., concurring in part, dissenting in part).

[53] Chief Justice Roberts and Justice Alito have not stated clearly on the record that they oppose justiciability, but they appear skeptical. Four Justices are strongly in favor of justiciability and believe there are available standards for adjudication. In the middle, Justice Kennedy speaks for the Court and maintains the unusual position that partisan

In the middle, and speaking for the Court, Justice Kennedy once more refused to adopt a strategy of minimal theorization that he and the Court had earlier adopted for other areas of redistricting law, namely for *Shaw v. Reno*.[54] Justice Kennedy's refusal to adopt such a strategy was striking because he himself had crafted the *Shaw* standard, one that shadowed the analysis that seems to be required for partisan gerrymandering.

In the *Shaw* cases, the Court attempted to clamp down on the excessive consideration of race in redistricting. In *Shaw v. Reno* itself, the Court found that the statewide redistricting of North Carolina raised an equal protection violation, but the Court was ambiguous about the nature of the injury in question.[55] The Court noted that "a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race."[56] As a minimally theorized decision, *Shaw v. Reno* left much undecided about the contours of the Court's reasoning.[57]

Just two years after *Shaw v. Reno*, the Court somewhat clarified its equal protection theory in *Miller v. Johnson*.[58] Justice Kennedy, speaking for the Court in *Miller*, explained that the critical standard in the *Shaw* cases was whether race served as "the predominant, overriding factor" motivating the redistricting, not whether race played *any* role at all.[59] Consideration of race

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gerrymandering is justiciable but there are no standards currently available for adjudication.

[54] Shaw v. Reno, 509 U.S. 630 (1993).

[55] *See, e.g.*, T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 603 (1993) (examining three different plausible interpretations of *Shaw v. Reno*); *see also* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1692–94 (2001) (describing initial understandings of *Shaw v. Reno*).

[56] *Shaw*, 509 U.S. at 646–47 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 341 (1993)).

[57] The Court hinted at several different theories about the equal protection injury in *Shaw*, with many commentators and lower courts concluding that the Court ultimately intended to target majority-minority districts with a bizarre geographic shape. *See, e.g.*, Richard H. Pildes & Richard Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993).

[58] Miller v. Johnson, 515 U.S. 900 (1995).

[59] *Miller*, 515 U.S. at 920. A prospective plaintiff, to make a successful showing under *Shaw*, "must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Id.* at 916. In an opinion written by Justice Kennedy, the Court made clear that *Shaw v. Reno* should not be interpreted as a prohibition on bizarrely shaped districts. The Court explained that *Shaw* did not "suggest that a district must be bizarre on

in redistricting might be permissible under *Shaw*, provided it did not so predominate the process such that it subordinated traditional redistricting criteria.[60] In other words, racial motivations in redistricting could be permissible, but not when taken to excess.[61]

As a result, the parallel was obvious between the critical inquiry in the *Shaw* cases on one hand, and the partisan gerrymandering cases on the other hand.[62] The relevant question for partisan gerrymandering is "whether the partisan interests in the redistricting process were excessive."[63] The inquiry—whether reliance on a particular consideration in the redistricting process became excessive—simply substitutes party for race.[64] In fact, the

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its face before there is a constitutional violation." *Id.* at 912. Instead, the Court clarified that shape is relevant only as "evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913.

[60] States were entitled, for instance, to consider race in providing representational guarantees for racial minorities in compliance with the Voting Rights Act. *Shaw* itself recognized that "[s]tates certainly have a very strong interest in complying with federal antidiscrimination laws . . . ." *Shaw*, 509 U.S. at 654. The Court effectively made clear in later cases that race-conscious redistricting necessary to comply with the Voting Rights Act would not by itself violate *Shaw*. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 958 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."); *Miller*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *see also Vera*, 517 U.S. at 990 (O'Connor, J., concurring). Even Justices Scalia and Thomas later noted, in *LULAC* no less, that they agreed the Voting Rights Act provides a compelling state interest under *Shaw*. *See LULAC*, 126 S. Ct. at 2667 (Scalia, J., joined by Thomas, J., concurring in part, dissenting in part).

[61] One pair of commentators summarized the Court's position as "the exhortation not to go 'too far' in relying upon race in redistricting . . . ." Aleinikoff & Issacharoff, *supra* note 55, at 618; *see also* Easley v. Cromartie, 532 U.S. 234, 241 ("Race must not simply have been *a* motivation . . . but the *predominant factor* motivating the legislature's districting decision.") (citations and internal quotation marks omitted).

[62] *See* Richard Briffault, *Defining the Constitutional Question in Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 397, 419 (2005) (citing the "nice analogy and precedent" of *Shaw v. Reno*); Richard H. Pildes, *supra* note 1, at 66–70 (praising *Shaw v. Reno* and citing the advantages of adoption of a *Shaw*-like standard in partisan gerrymandering).

[63] Vieth v. Jubelirer, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring in the judgment).

[64] As Justice Stevens summarized in *Vieth*, "[I]f the State goes 'too far'—if it engages in 'political gerrymandering for politics' sake'—it violates the Constitution in the same way as if it undertakes 'racial gerrymandering [under *Shaw*] for race's sake.'" *Vieth*, 541 U.S. at 326 (Stevens, J., dissenting). The plaintiffs in *Vieth* conceded that it would be "quixotic" at best to prohibit consideration of partisan politics in redistricting. *Id.* at 285.

plaintiffs in *Vieth* relied upon *Shaw v. Reno* and attempted to import the "predominant intent" standard for partisan gerrymandering.[65]

Notably, though, Justice Kennedy elected not to adopt for partisan gerrymandering the "predominant intent" standard that he had invented for racial gerrymandering. What is more, Justice Kennedy in *LULAC* (and *Vieth*) appeared to channel his critics—those who attacked his efforts in the *Shaw* cases. Just as Justice Souter, for instance, criticized the "predominant intent" standard in racial gerrymandering for its unmanageability,[66] Justice Kennedy rejected the standard in the partisan gerrymandering context and underscored "the absence of any workable test for judging partisan gerrymanders."[67] Just as Justice Souter argued that the mixed-motive inquiry into racial motivations of a legislature was intractably complex,[68] Justice Kennedy argued in *LULAC* that the mixed-motive inquiries "can be complex" and "affixing a single label to those acts can be hazardous."[69] Justice Kennedy thus appeared to reject new application of his own standard largely for the same weaknesses others had alleged against it in the *Shaw* cases.[70]

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[65] Brief for Appellants, *supra* note 40, at 19. In dissent, Justice Stevens proposed adoption of the *Shaw* standard as applied to partisan considerations and argued that "[i]t follows that the standards that enable courts to identify and redress a racial gerrymander could also perform the same function for other species of gerrymanders." *Vieth*, 541 U.S. at 336 (Stevens, J., dissenting).

[66] *See* Bush v. Vera, 517 U.S. 952, 1057–64 (1996) (Souter, J., dissenting).

[67] LULAC, 126 S. Ct. 2594, 2611 (2006).

[68] *See Vera*, 517 U.S. at 1057–64 (Souter, J., dissenting).

[69] *LULAC*, 126 S. Ct. at 2609.

[70] Of course, Justice Kennedy justified the disparate treatment of racial and partisan gerrymandering in his mind, though his reasoning is unpersuasive. Justice Kennedy claimed that racial and partisan gerrymandering differed fundamentally because "[r]ace is an impermissible classification." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment); *see also Vieth*, 541 U.S. at 284–86 (contrasting the permissibility of race and party considerations in redistricting) (plurality).

However, the *Shaw* cases were never clear that race was an unconstitutional consideration in redistricting, at least when necessary to comply with the Voting Rights Act. *See supra* note 60; *see also Vieth*, 541 U.S. at 336 (Stevens, J., dissenting) (noting that "race can be a factor in [redistricting] . . . so long as it does not predominate"). For both racial and partisan gerrymandering, the critical question is ultimately the same—has consideration of a permissible consideration in redistricting gone too far?

Nor can it be said that Justice Kennedy simply did not see sufficient harm in partisan gerrymandering. Justice Scalia asked rhetorically whether "the regular insertion of the judiciary into districting, with the delay and uncertainty that it brings to the political process and the partisan enmity it brings upon courts, [is] worth the benefit to be achieved." *Vieth*, 541 U.S. at 301 (plurality); *see also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1294 (2006) (arguing that Justice Scalia relied on the prudential observation that the costs of judicial intervention outweighed the benefits). However, Justice Kennedy, he wrote,

Justice Kennedy's ambivalence leaves it bizarrely unclear where the law of partisan gerrymandering stands.[71] The plurality in *Vieth*, as a result, argued that Justice Kennedy's vote ought to be understood effectively, if not expressly, as "a reluctant fifth vote against justiciability."[72] Justice Breyer in dissent, instead, noted that Justice Kennedy voted in favor of justiciability and hoped for further discussion of appropriate standards to apply in future cases.[73] Whatever the effect of *Vieth*, *LULAC* did nothing to change it. In other words, Justice Kennedy strained to reach an exceptional outcome that fails to say what the law is now or even what it might be in the future—what Daniel Lowenstein calls an "unusually and perhaps uniquely irresponsible" position—not once, but twice in two years as the voice of the Court.[74]

For lower courts, *Vieth* provided no real guidance on partisan gerrymandering, and *LULAC* is unlikely to do better. Justice Kennedy basically invited lower courts to experiment with gerrymandering cases in hopes of finding a standard that he and the Court will finally find satisfactory. The early results from lower courts, however, have been disappointing, as one might have expected. One district court dismissed the partisan gerrymandering claim before it, parroting Justice Kennedy, because the plaintiffs failed to present a manageable standard for adjudication.[75] Another court interpreted *Vieth*, despite Justice Kennedy's protestations otherwise, as establishing the nonjusticiability of partisan gerrymandering.[76] Yet another district court simply applied the rational basis test to an alleged gerrymander and rejected the plaintiffs' claim when the government cited

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came to a different answer on this question and kept open the possibility of "the regular insertion of the judiciary into districting." *Vieth*, 541 U.S. at 301. While acknowledging the need for judicial caution, Justice Kennedy emphasized that a "determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene." *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring in the judgment).

[71] Once the Court had made the threshold determination that the plaintiffs had presented a justiciable claim, it was the Court's responsibility, and thus Justice Kennedy's obligation in *Vieth* and *LULAC*, to specify the legal standards by which to adjudicate the claim. *See Vieth*, 541 U.S. at 301 (plurality) ("It is logically impossible to affirm that dismissal without either (1) finding that the unconstitutional-districting standard applied by the District Court, or some other standard that it *should* have applied, has not been met, or (2) finding [as the *Vieth* plurality did] that the claim is nonjusticiable."); *see also* Lowenstein, *supra* note 6, at 390–91.

[72] *Vieth*, 541 U.S. at 305.

[73] Daniel Lowenstein agrees and reasons that *Vieth*, as essentially a non-decision, leaves *Bandemer* as controlling law. Lowenstein, *supra* note 6, at 391–94.

[74] *Id.* at 390 n.101.

[75] *See* Shapiro v. Berger, 328 F. Supp. 2d 496 (S.D.N.Y. 2004).

[76] *See* Meza v. Galvin, 322 F. Supp. 2d 52, 58 (D. Mass. 2004).

traditional redistricting criteria as its ostensible motivation.[77]

III. A STRUCTURAL APPROACH TO PARTISAN GERRYMANDERING AND THE LAW OF DEMOCRACY

Justice Kennedy does not speak explicitly in terms of a structural approach to the law of democracy, as do academic critics of the Court, but even as the reasoning of only one Justice, his efforts in *Vieth* and *LULAC* may be telling for a larger structural approach to the law of democracy.[78] Although it is easy to underplay the structural elements of Justice Kennedy's opinions, the shift away from the limitations of *Shaw v. Reno* and his insistence on a group-based vision of fair politics happen to run parallel to the structural approach emphasized in the academic commentary.

However, to the degree that Justice Kennedy adopts elements of a structural approach, his ultimate failure to articulate a partisan gerrymandering standard is an unfortunate sign for it. *Vieth* and *LULAC* are not a failure of judicial perspective on structural challenges, but a failure of judicial confidence to resolve them. It suggests the limits of judicial confidence and capacity to answer structural challenges even once they are recognized and confronted.

A. *A Structural Approach to Partisan Gerrymandering*

Commentators over the course of a decade have criticized the Court for focusing too narrowly on rights frameworks borrowed from other domains and neglecting the broader structural considerations inherent and specific to

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[77] *See* Johnson-Lee v. City of Minneapolis, No. 02-1139, 2004 WL 2212044 (D. Minn. Sept. 30, 2004).

[78] Why focus so closely on Justice Kennedy? First, under the methodology of *Marks v. United States*, 430 U.S. 188 (1977), Justice Kennedy's standard would have represented the law of the Court. *See, e.g.*, *Johnson-Lee*, 2004 WL 2212044, at *12. Justice Scalia's sweeping opinions in *Vieth* and *LULAC* would have rendered all partisan gerrymandering claims, under any facts, non-actionable as a nonjusticiable matter beyond judicial jurisdiction. Kennedy's opinion dismissing the claims in *Vieth* but preserving a right of action under certain circumstances would have been narrower under *Marks*. *LULAC* did nothing to change this state of affairs.

Second, as a simple matter of counting votes, Justice Kennedy almost certainly would be the fifth vote for any conceivable majority of Justices striking down a partisan gerrymander in a future case. The four Justices dissenting in *Vieth*, and effectively dissenting in *LULAC*, were eager to persuade Justice Kennedy to join them in support of some standard, whether his own or one of their proposals. *See* Fuentes-Rohwer, *supra* note 1, at 1946–47 (arguing that the dissenters would have joined whatever standard Justice Kennedy selected). If the four dissenters find a fifth vote, it will be from Justice Kennedy.

the law of democracy.[79] By "structural approach," these commentators advocate theory designed normatively "to regulate the institutional [structure] within which politics" play out, rather than to correct "individual harms" as conventionally defined.[80] Under a structural approach, courts should decide cases directed toward the practical implications for politics and what "best help[s] realize the appropriate systemic aims of elections."[81] They argue that individual rights are designed to serve structural goals, and in the law of democracy, courts ought to serve those structural goals more directly. As a consequence, a structural approach typically requires courts to assess the sociopolitical dynamics among politically relevant groups in ways that break from the conventional focus on individual rights and principles.

However, to achieve what commentators urge, courts need to develop a theory about the proper functioning of American politics. Courts can execute a structural strategy only if they can first decide what aims to pursue and understand how best to achieve those aims. Courts "inevitably must act on the basis of some conception of what politics ought to be—an explicit or, more often, implicit view of how politics ought to go from a constitutional vantage point."[82] If a deeper theory governing the law of democracy applies anywhere, it must apply to the way that courts decide cases involving partisan gerrymandering. Political parties are the principal mediating devices in American politics.[83] Gerrymandering involves the strategic re-structuring of electoral law by these parties to skew basic political competition in their favor. Courts are asked to restrict, at some extreme, the ability of parties to upset the political balance of power through the redistricting process, and as Heather Gerken puts it, "[c]ourts cannot decide whether power has been 'fairly' or 'properly' allocated among voters without having a broader theory of how a healthy democracy should function."[84]

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[79] *See, e.g.*, Gerken, *supra* note 1, at 506–07; Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1217–19 (1999). *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345 (2001).

[80] Gerken, *supra* note 39, at 1417.

[81] Pildes, *supra* note 39, at 1623.

[82] Richard H. Pildes, *Two Conceptions of Rights in Cases Involving Political "Rights,"* 34 HOUS. L. REV. 323, 324 (1997).

[83] *See generally* Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005); *see also* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus"*, 50 UCLA L. REV. 1141, 1149–51 (2003) (describing the central importance of party identification for voter competence).

[84] Gerken, *supra* note 1, at 521.

As such, commentators have roundly criticized the Court for failures to engage the structural issues at play in redistricting cases.[85] Richard Pildes argues that "[s]tructural judgments about the proper processes of redistricting or about the fair distribution of seats among groups, given the distribution of votes cast, are unavoidable."[86] Samuel Issacharoff and Pamela Karlan allege that the Court avoided the structural questions of redistricting in deciding *Vieth v. Jubelirer*.[87] As they put it, "[o]f most concern to us is the potential to further misdirect legal challenge to gerrymandering into the mold of individual rights."[88] They criticize the attempts by the dissenters to cabin partisan gerrymandering claims into the pigeonhole of discrimination law, drawing on close analogies to individual race claims elsewhere in the Court's jurisprudence.

However, in *Vieth* and *LULAC*, Justice Kennedy analyzes partisan gerrymandering through what may amount to a structural lens in at least two subtle ways that should not be overlooked. First, Justice Kennedy insists upon a positive vision of fair politics as the normative baseline for partisan gerrymandering. Echoing Pildes, Justice Kennedy forthrightly frames an unavoidable structural question in partisan gerrymandering as how to determine "the fair distribution of seats among groups, given the distribution of votes cast."[89] Far from avoiding this important question, Justice Kennedy confronts it and stakes his position in *Vieth* and *LULAC* on its centrality to the constitutional question. Just as commentators insist, Justice Kennedy recognizes the need for courts to "act on the basis of some conception of what politics ought to be."[90] Justice Kennedy's stubborn insistence on identifying a substantive definition of political fairness can be understood as a response, however troubled, to that recognized need. Indeed, Justice Kennedy's ultimate failure to offer a legal standard may be a consequence of his unwillingness to brush aside the need for just such a structural answer.

Second, Justice Kennedy rejected application of individual-based discrimination standards and instead discussed partisan gerrymandering in distinctly group-oriented terms. Certainly, the dissenters' proposals in *Vieth* were prime examples of "how judges conceive of structural problems in democratic institutional design."[91] Except for Justice Breyer, the dissenters offered standards borrowed directly from other traditional domains enforced

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[85] *See generally* Issacharoff & Karlan, *supra* note 1 (2004); Pildes, *supra* note 1.

[86] Pildes, *supra* note 1, at 59.

[87] Issacharoff & Karlan, *supra* note 1, at 561–64.

[88] *Id.* at 575.

[89] *See* Pildes, *supra* note 1, at 59.

[90] Pildes, *supra* note 82, at 324.

[91] Pildes, *supra* note 1, at 70.

through individual rights, such as race discrimination and political patronage cases. They reached for analogies from other areas of law, with distinctly individualistic orientations, and arguably misapplied them to the structural problems of the law of democracy. For this reason, Justice Kennedy shuns the dissenters' solutions, sounding in individual rights, and demands what Issacharoff calls a "real conception of what a properly functioning electoral system looks like."[92] Admittedly, Justice Kennedy refers to "representational rights," an individualistic allusion, but he refers intently throughout *Vieth* and *LULAC* to group harms and thereby corrects one of the most criticized elements of *Shaw v. Reno*—the atomistic focus on the individual harm from racial gerrymandering[93]—by shifting the level of analysis for partisan gerrymandering to groups.

Consistent with the group-orientation theory of partisan gerrymandering, Justice Kennedy recognizes that a representational injury must be measured, not by individual district, but by statewide redistricting. Any individual voter does not suffer a representational injury simply because his party's candidate fails to win his district—partisan gerrymandering causes a representational burden to groups deprived of a rightful allocation of power across the entire jurisdiction. The injury from partisan gerrymandering at the statewide level must occur and be measured at the statewide level. Justices Souter and Stevens frame partisan gerrymandering as an individualized harm and identify that harm in particular districts, rather than the overall statewide redistricting, but Justice Kennedy does not. Indeed, in a telling observation, Justice Kennedy explains that a pattern of gerrymandering across three states might constitute a greater harm than a gerrymander in a single state.[94]

Commentators argue that the entire Court continues to frame gerrymandering in terms of rights talk.[95] However, Justice Kennedy rejects the most accessible individual-rights analogies that formerly captured his loyalties so firmly. What is more, reasoning in terms of rights is not at all inconsistent with a structural orientation to the law of democracy. An early insight of those in favor of structuralism was that structural concerns frequently underlie and motivate individual-rights frameworks both inside and outside the law of democracy.[96] Commentators criticize the Court,

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[92] Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 611 (2002).

[93] *See generally* Gerken, *supra* note 55, at 1663.

[94] Vieth v. Jubelirer, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring in the judgment).

[95] *See, e.g.*, Issacharoff & Karlan, *supra* note 1, at 561–64.

[96] *See, e.g.*, Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999); Laurence H. Tribe, Saenz *Sans*

including Justice Kennedy, for failing to reframe partisan gerrymandering more ambitiously as a problem of incumbent entrenchment. But reasonable people may agree on the advisability of a structural approach without agreeing on specific structural aims. While some emphasize political competition as a structural aim, others emphasize goals of political stability and partisan representation,[97] which are aims closer to Justice Kennedy's heart elsewhere in the law of democracy.[98]

Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?, 113 HARV. L. REV. 110 (1999).

[97] *Compare* Issacharoff, *supra* note 92, at 593, *with* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002); *see generally* Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 724–28 (1998).

[98] Ironically, Richard Pildes has argued that the Rehnquist Court was essentially driven by structural motivations, even if it was not forthright at all about its purposes. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001) (arguing that Rehnquist Court's decisions in the law of democracy were driven by the desire for political order).

Also intriguing is Justice Kennedy's effort in *LULAC* to refashion claims under the Voting Rights Act. Aside from their partisan gerrymandering claims, the plaintiffs in *LULAC* also alleged that the Texas redistricting violated Section 2 of the Voting Rights Act. LULAC, 126 S. Ct. 2594, 2612–13 (2006). Specifically, the Texas redistricting reduced the number of Latino voters in Congressional District 23, where Latinos formerly constituted a majority. To stave off a challenge under Section 2 of the Voting Rights Act, the redistricting attempted to offset the resulting dilution of the Latino vote by creating a majority Latino district elsewhere in Congressional District 25.

Justice Kennedy, however, held for the Court that the new District 25 failed as a remedy for the vote dilution. He explained that the Latino residents of District 25 constituted two "'disparate communities of interest,' with 'differences in socio-economic status, education, employment, health, and other characteristics,'" separated geographically by 300 miles. *Id.* at 2618. In an earlier case, *Shaw v. Hunt*, 517 U.S. 899 (1996), the Court expressed related dissatisfaction with an offset district in a location other than where the Court identified a vote dilution injury, but Justice Kennedy went beyond this earlier reasoning. Justice Kennedy noted that the geographic distance of 300 miles is salient and what he deemed the "divergent needs and interests" of the two communities outside the fact that they would together "elect a candidate each prefers." *LULAC*, 126 S. Ct. at 2612–24.

In other words, Justice Kennedy demanded commonality of group interests beyond race and voting preferences as usually required under the Voting Rights Act. *See generally* Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. (forthcoming 2008) (criticizing the new implicit requirement of cultural homogeneity). The long-term ramifications of Justice Kennedy's reasoning are unclear. *Compare* Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139 (2007) *with* Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185 (2007). I doubt that Justice Kennedy commands a majority for a broader reading of compactness under the Voting Rights Act that would expand his

In sum, Justice Kennedy fails in *Vieth* and *LULAC*, but his failure is not the clear result of inability to see partisan gerrymandering through a structural, or at least quasi-structural lens. Justice Kennedy mimics structural positions in important ways, and his troubles in *Vieth* and *LULAC* are not the product of a blind extension of *Shaw v. Reno* or an individual-based approach to partisan gerrymandering. Instead, Justice Kennedy's ultimate inability to produce a legal standard in *Vieth* and *LULAC* is a failure of judicial confidence, not of judicial perspective.

B. *The Future of a Structural Approach to the Law of Democracy*

Despite his willingness to entertain partisan gerrymandering as a constitutional question, Justice Kennedy balked at articulating a justiciable standard in the end. The decision to confront such structural questions—to enter the political thicket—the Court originally made in *Baker v. Carr*, and Justice Kennedy renewed it in *Vieth* and *LULAC* by declaring the continuing justiciability of partisan gerrymandering. Once courts take them on, the structural questions in the law of democracy require judges to "make their private views of political wisdom the measure of the Constitution," just as Justice Frankfurter warned in *Baker v. Carr*.[99] It is at this point when Justice Kennedy balks.

Although some commentators may feel that the Court's confusion on partisan gerrymandering was the result of an individual-rights focus,[100] Justice Kennedy's unwillingness to articulate a standard is not borne of myopia. Instead, Justice Kennedy argued, essentially on prudential grounds, that courts should not assume "political . . . responsibility for a process that often produces ill will and distrust."[101] Justice Kennedy balked not because he cannot see the structural challenges inherent in partisan gerrymandering, but because he lacked confidence in judicial competence to resolve them.[102]

It is telling that Justice Kennedy cites as a source of his hesitation an absence of consensus about fair redistricting practices. Such reasoning

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ruling far beyond *LULAC*. Nonetheless, this reasoning in *LULAC* suggests the directions of Justice Kennedy's thinking about what constitutes a politically relevant group with shared interests deserving of judicial protection. Justice Kennedy's search for a broader sensibility about group-oriented politics may eventually connect with a vision, yet unfulfilled, for a standard of partisan gerrymandering.

[99] Baker v. Carr, 369 U.S. 186, 301 (1962) (Frankfurter, J., joined by Harlan, J., dissenting).

[100] *See* Fuentes-Rohwer, *supra* note 1, at 1946.

[101] Vieth v. Jubelirer, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment).

[102] *But see* Fuentes-Rohwer, *supra* note 1, 1946–48 (arguing that Justice Kennedy's position in *Vieth* was strategically motivated).

follows only if Justice Kennedy intends to depend, or at least draw heavily, on existing consensus to define the standard. Justice Kennedy does not consider seriously in *Vieth* and *LULAC* the possibility of choosing among contending sensibilities about redistricting. Dismissed outright is the possibility that "courts could determine, by the exercise of their own judgment, whether political classifications . . . burden representational rights."[103] For Justice Kennedy, a self-confident Justice if there is one and the author of the controlling opinion in *Bush v. Gore*, it is a notable "failure of judicial will."[104]

Equally telling is that Justice Kennedy cites the one-person, one-vote rule as a positive example for the development of the law of partisan gerrymandering. For Justice Kennedy, the appeal of the one-person, one-vote rule is easy to understand. Today the rule represents a model of the popular consensus he seeks for partisan gerrymandering. The one-person, one-vote rule has become ingrained in the popular culture such that it is difficult for the layperson to imagine any alternative.[105] Nonetheless, the Court did not discover a normatively uncontestable standard of one-person, one-vote any more than it possesses one now for partisan gerrymandering.

In the one-person, one-vote cases, the Court insisted upon a rule of one-person, one-vote despite intense controversy when it was announced. There were no "principled, well-accepted rules of fairness" in redistricting that dictated, or even suggested, a requirement of one-person, one-vote when the Court developed the rule in the 1960s. *Baker v. Carr* has been called the "most profoundly destabilizing opinion in the Supreme Court's history."[106] What is more, these early redistricting cases featured famous dissents criticizing as judicially unmanageable the very one-person, one-vote rule that Justice Kennedy cites as a model. Justice Stewart at the time protested angrily, echoing Justice Kennedy today, that his "own understanding of the various theories of representative government is that no one theory has ever commanded unanimous assent among political scientists, historians, or others."[107] Far from codifying an existing consensus about apportionment,

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[103] *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment).

[104] *Id.* at 341 (Stevens, J., dissenting).

[105] *See generally* Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213 (2003).

[106] SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 161 (2d ed. 2001).

Anthony Lewis privately characterized the announcement of the one-person, one-vote rule as the "second American Constitutional Convention." LUCAS A. POWE, THE WARREN COURT AND AMERICAN POLITICS 252 (2000) (quoting Anthony Lewis's note to Archibald Cox).

[107] Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 748 (1964) (Stewart, J., dissenting).

the one person, one vote cases "cast aside . . . [the] uniform course of our political history regarding the relationship between population and legislative representation."[108]

In other words, the one-person, one-vote decisions required no less of the Court then than the partisan gerrymandering cases require of it today. In neither set of cases did consensus provide a ready-made standard for the Court to apply. Nor can the Court be said to discover, rather than decide, a standard of political fairness in redistricting. However, Justice Kennedy insists on a standard for partisan gerrymandering dictated by "agreed upon substantive principles of fairness in districting,"[109] a qualification absent for the one-person, one-vote rule when it was announced. Justice Kennedy longs for a valid test that specifies the precise level at which partisanship goes too far, but the determination of a standard remains a normative judgment that will require the Court to accept the political responsibility of leading from ahead on partisan gerrymandering.

Vieth and *LULAC* thus signal an ironic failure of judicial confidence in the law of democracy. Just as *Baker v. Carr* ushered an era of increasing judicial intervention in the law of democracy, the Court's approach to partisan gerrymandering may provide important signs about the future of what Richard Pildes calls the constitutionalization of the law of democracy.[110] The Rehnquist Court, one not known for its judicial modesty, backed away from forthright confrontation with structural challenges. Most of the Court quickly retreated to the familiar tools of judicial avoidance (through nonjusticiability) and doctrinal analogy (to race discrimination law). And Justice Kennedy, while accepting the burden of justiciability, ducked for the cover of "agreed upon substantive principles" and found himself mocked for his confused position in both cases. *Vieth* and *LULAC* are pessimistic signs for those who advocate a forthright embrace by courts of a structural approach to the law of democracy.

IV. CONCLUSION

Partisan gerrymandering represents a measure of the Court's willingness and capacity to continue its deep engagement with the law of democracy. Justice Kennedy's moves on partisan gerrymandering signal both a shift from a traditional individual-based approach to the law of democracy and decreasing judicial confidence. On one hand, Justice Kennedy rejected easy extension of the methodology and reasoning exemplified by *Shaw v. Reno* to partisan gerrymandering in a manner that reflects appreciation of its

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[108] Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

[109] *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in judgment).

[110] Pildes, *supra* note 1, at 28.

structural shortcomings. On the other hand, Justice Kennedy ultimately blinked when confronted with the structural challenges he may now begin to recognize in partisan gerrymandering.

What may be most interesting in the coming years is whether the Court moves toward confronting, and answering, structural questions in other areas of the law of democracy as well. It is difficult to imagine a quick resolution of partisan gerrymandering concerns any time soon after *Vieth* and *LULAC*. Yet Justice Kennedy remains at the political center of the newly inaugurated Roberts Court and hinted in *LULAC* at new developments in his interpretation of the Voting Rights Act that will certainly be tested again following the recent renewal of the Act.